PENDAKWA RAYA

v.

NG GHIAP CHUA

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING SUMMONS NO. 58-16-88]
24 APRIL 1992

CRIMINAL PROCEDURE: *Trafficking drugs - Prosecution witness evidence that accused pleaded and requested incriminating package be thrown into toilet when discovered - The sole evidence of custody or control by accused - Question of law - Plea and request amounted to a statement by accused to a police officer below rank of inspector - Whether evidence inadmissible under s. 113 Criminal Procedure Code - Whether presumption to attribute exclusive possession under s. 37(d) Dangerous Drugs Act 1952 could be invoked - Section 39B(1)(a) Dangerous Drugs Act 1952.*

The accused (A) was charged with trafficking 30.29 grams of heroin in contravention of s. 39B(1)(a) DDA 1952. A was arrested together with another person in a police raid led by one Inspector Jasbir Singh (PW3) on a house in Johor Bahru. During the raid a search was conducted and a member of the raiding team PW3 discovered a red package inside an iron grill covered draining hole in a toilet in the house. PW3 then examined the package upon recovery of the same by PW4 and found it to consist of four layers of plastic bags the innermost of which contained 10 small sachets and 41 loose sachets of granular substances. These 51 sachets were later analysed and confirmed by the Government Chemist PW1 to contain 30.29 grams of heroin.

The prosecution's only evidence of A's custody or control of the incriminating package was PW4's evidence that when the package was discovered A embraced PW4 and pleaded with him to throw the package into the toilet.

The accused was called upon by the Court to enter his defence.

Held:

[1] PW4's statement relating to the accused's plea and request to him to dispose of the incriminating package become inadmissible under s. 113 of the Criminal Procedure Code as any such plea or request clearly amounted to a statement by the accused to a police officer below the rank of an Inspector.

[2] Since PW4's statement was the only evidence indicating accused had custody or control of the incriminating package and without it the presumption under s. 37(d) could not have been invoked to attribute exclusive possession against appellant, the prosecution's evidence was deficient in respect of the charge against accused and he should not have in the first place been called to enter upon his defence.

[Accused acquitted and discharged.]

Legislation referred to:
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, ss. 37(b), (d), (da)(i), (g), (h), 39B(1)(a)

For the prosecution - Azmi Arifin, DPP
For the accused - S.C. Loh; M/s. Vincent Lai Lim & Co.

JUDGMENT

LC Vohrah J:

The accused was charged with trafficking in 30.29 grams of heroin on 4 October 1987 at about 11.10 a.m. at No. 6, Jalan Kencana, Johor Bahru in contravention of s. 39B(l)(a) of the Dangerous Drugs Act 1952.

In brief, Inspector Jasbir Singh (PW3), acting on information received on 4 October 1987 at about 10.30 a.m., led a party of policemen comprising of Detective Corporal Mohd. Shariff bin Haji Jamaluddin, Detective Corporal Muda bin Mohd, Detective Corporal Abdul Wahid bin Ibrahim (PW4), Detective Constable Borhan bin Wahab (PW5), Detective Constable Yassin bin Yusoff and Detective Constable Lau Kek to No. 6, Jalan Kencana, Kim Teng Park, Johor Bahru in two cars. As the two cars passed the house they drove on because PW3 spotted and recognised a male Chinese who was within the compound of the house by the front door. They re-grouped some distance away and then returned to the house at about 10.45 a.m. PW3 went up to the gate of the house and on finding it secured by a padlock called out the name of the person he had recognised earlier and also rattled the padlock on the gate. After about 5 minutes the male Chinese, who was the accused, opened the front door and on recognising PW3 unlocked the gate as requested by PW3 who together with PW4, PW5 and Detective Corporal Muda entered the house and proceeded to conduct a search of the premises. Inside a cabinet in the hall PW5 discovered a plastic bag (P5G) containing 170 empty plastic sachets (P5I-L). He also discovered therein 4 Chinese newspaper cuttings (P5H and P16A-C). They then searched the master-bedroom and an adjacent room beside the hall but found nothing incriminating. A search was then conducted of a third room and the store-room, both at the back of the house. There too nothing incriminating was discovered. Then whilst PW3 was at the back of the house in the kitchen, where a lady by the name of Lim Siew Tee was busy cooking, PW4 and PW5 went to search the toilet next to the kitchen. On entering the toilet PW4 saw a red pail (P10) filled with water lying on the floor. He moved P10 and found that it had actually obstructed from view a draining hole which was covered by an iron-grill. When he examined the draining hole he discovered a red package inside it and took it out. PW4 then summoned PW3 who was still in the kitchen. PW3 came and examined the package and saw it to consist of 4 layers of plastic bags in the innermost of which (P4D) he found a newspaper package (P4E) containing 10 small sachets (P4E.EE1 to EE10) of granular substances which he believed to be heroin and, additionally, 41 loose sachets (P4F.FF1 to FF41) whose contents he also believed to be heroin. PW3 then arrested the accused and the lady for possession of these incriminating items. The contents of the 51 sachets were later analysed by the Government Chemist (PW1) who found them to contain 30.29 grams of heroin.

These facts were revealed by the evidence of PW3, PW4, PW5 and PW1. The evidence of PW3 also revealed that the accused had been known to him as far back as 1981 when the accused told him that the woman Lim Siew Tee was his wife. It was also the evidence of PW3 that when the accused first opened the front door of the house he greeted PW3 with the words: “Sudah lama tak jumpa Tuan.” whereupon PW3 replied, “You tak cakap you duduk ini rumah.” After unlocking the gate and on letting PW3 and his men into the house the accused asked, “Apa hal, Encik?” eliciting a reply from PW3 in the words: “Ada orang komplain you ada jual peh hoon.” The accused then replied, “Mana ada Tuan. Saya tak ada bikin itu kerja lagi.” The accused also told him that the master-bedroom in the house was his. Further, PW4 in his evidence stated that when he retrieved the red plastic package from the draining hole the accused embraced him from behind and entreated him to throw it into the toilet. PW1 testified that when he was asked to analyse the contents of the 41 plastic

sachets he was also requested to examine the 170 empty plastic sachets which had been discovered by PW5 and he found that the empty sachets were similar in dimension, average thickness, average weight and appearance (by reference to the seam line) to the 41 plastic sachets. PW1 also testified that he had been asked to determine if P5H, one of the four newspaper cuttings found by PW5 in the cabinet, was from the same origin as the newspaper wrapper P4E which contained the 10 plastic sachets and that he found them to make a complementary fit suggesting therefore that P4E was torn out P5H. The evidence of PW3, PW4 and PW6 also revealed that of the three rooms in the house only the master-bedroom showed evidence of human occupancy by a man and a woman by the presence of a double-bed, a wardrobe containing men's and women's clothing, soap and a toothbrush. It was also in the evidence of PW6 that male and female clothing were taken out from the wardrobe, tried out on both the accused (at the house) and Lim Siew Tee (at Larkin Police Station) and were found respectively to have fitted them. It was also in his evidence in cross-examination that there was neither wardrobe nor furniture in the second room. The evidence of PW3 also showed that two bunches of keys (P11A-C and P12A-D) were recovered by him from the table in the living room on the morning of the raid and that of PW6 revealed that 2 keys from each of these 2 bunches unlocked the gate and the front door of the house.

The above were the essential facts the prosecution relied on in conjunction with the presumptions under ss. 37(b), (d), (da)(i) and (g) of the Act to establish its case of trafficking against the accused.

At the end of the prosecution case after the principal witnesses had given their evidence and the remaining witnesses offered to the defence, learned Counsel for the accused contended that on the evidence adduced no case had been made out by the prosecution on the charge. He challenged the prosecution case on grounds which can be summarised as follows:

1. That the prosecution had failed to show that the accused had "exclusive possession of the house".
2. That the prosecution had failed to take serious steps in bringing to Court Lim Siew Tee and Tan Leong to establish who actually had the care and management of the house.
3. That the draining hole in the toilet from where the incriminating plastic package was taken out was not concealed in a "specially constructed compartment" for the purpose of imputing knowledge to the accused under s. 37(h) of the Act.
4. That the evidence of PW4 relating to his being embraced by the accused on retrieving the incriminating package from the sink-hole and of PW6 on his having tried out the clothes on the accused at the house to see if they fitted him on the night in question had been concocted.

I rejected the arguments of learned Counsel for the accused on all the four grounds. As to ground No. 1, I was of the view that the conversation that took place between PW3 and the accused when PW3 sought entry to the house on the morning of the raid, which, having been made before the accused's arrest, was admissible under s. 113 of the Criminal Procedure Code, clearly indicated that he and his wife were the occupiers of the house having regard especially to the accused's statement to PW3 that he had just rented the house with his wife and that the master-bedroom was his and bearing in mind that the two remaining rooms in the house were unoccupied and that the two sets of keys P11A-C and P12A-D belonging to the house were found on the table in the living room at the time of the raid when the accused and his wife were the only persons in the house. Further, the discovery of the

incriminating package found concealed in the draining hole covered by a metal grill underneath the pail and the conduct of the accused in embracing PW4 and then entreating him to dispose of it in the toilet, in my view, afforded *prima facie* evidence that he as occupier must be presumed to have known of its concealment there by virtue of s. 37(g) of the Act and must have had control of it so that he must be deemed to have had possession of the package and deemed to have known of the nature of its contents by virtue of s. 37(d) of the Act. As to ground No. 2, I did not think the failure on the part of the prosecution to call the two named persons, having regard to the evidence as it stood, created any gap in the prosecution evidence. It was obvious to me that ground No. 3 had no merit as the presumption under s. 37(h) of the Act had not been invoked by the prosecution. As to ground No. 4, I had no reason at that stage to doubt the veracity of PW4 or PW6 to justify the conclusion that their respective evidence as to the conduct of the accused upon the discovery of the incriminating package and the trying out of the clothes at the house had been concocted. In the result I called upon the accused to enter upon his defence.

The accused aged 54 years elected to give evidence which can be paraphrased as follows. He rented a room in the house from someone he knew as "Ah Lek" for RM200 per month and on the day in question he had stayed there for 7 to 8 months. He occupied the first room in the house with his wife who joined him from Singapore some 5 to 6 months after he moved in. The adjoining second room had been occupied by Ah Lek until 3 to 4 months before the day of his arrest. On that day he had woken up at about 7.00 a.m. and after he had breakfast prepared by his wife he read the newspapers. Then a friend of his by the name of Chia Kim Huat called at the house and informed him that his wife had been admitted into hospital and that he wanted to speak with him but during the whole of the time lasting 10 to 20 minutes that Chia remained in the house Chia did not disclose what he wanted to talk about and left saying that he would come back later to do so. He did not notice if Chia brought anything with him and as he was engaged reading the newspapers he was not aware what Chia actually did in the house. After Chia's departure he was in the kitchen between 10.00 and 11.00 a.m. washing vegetables when he heard someone calling from outside the house. When he went up to the hall and looked out he saw PW3 whom he knew as an anti-drugs officer. PW3 requested him to let him in as he explained he had some business with him. After PW3 had entered the hall he asked PW3 what his business was and PW3's reply was that someone had told him that there was heroin in the house. He said he knew nothing about it and asked PW3 who his informant was. PW4 only replied that if he did not know anything about it how was it that people had informed him of it. He then asked PW3 to search the house. Then PW3 with two of his men proceeded to search the house after PW3 had asked him to follow him and watch them search. After finding nothing incriminating in the first room and also in the second room, which was empty except for 4 boxes and a wardrobe containing dirty clothes, PW3 went to the area at the entrance of the rear toilet where PW3 examined a draining hole outside the toilet. At this point of time the two other men had already entered the toilet. When PW3 discovered nothing incriminating in this draining hole PW3 went to search the draining hole in the kitchen accompanied by him and there too nothing incriminating was discovered. Then someone called out, "Hey! Mari" whereupon both PW3 and he proceeded to the entrance of the toilet where one of the two men showed him something and asked, "Apa barang ini?". He replied, "Barang ini mana datang?". The answer that came was: "Angkat ini lobang dalam." He then asked to be shown its contents but his request was turned down. At that point PW3 instructed him to go and sit in the hall. At no time were the contents opened up for sight by him. He never embraced PW4 and he never saw PW4 surrendering the thing he discovered to PW3. It was only at the police station that he saw a package but he never saw the items shown in the photograph P9 displaying all its contents.

In answer to cross-examination he stated that he used to assist his wife in the kitchen but had never had the occasion to utilize the toilet right next to it throughout the period that he stayed at the house because of the availability of the toilet next to his room.

The accused did not call any witnesses and his defence amounted in effect to an assertion that the charge against him was a frame-up.

I did not find the accused to be a truthful witness. I found it odd that the accused should have continued reading his newspapers and been unaware of Chia's movements in the house on the morning in question when Chia had come specially to see him and discuss some matter with him. I also found it incredible that in all the period of 7 to 8 months he had stayed at the house and worked in the kitchen he had never used the toilet immediately next to it. I also found it incredible that the person who recovered the incriminating package should, before handing it to his superior officer PW3, have asked him the question about the nature of the object whilst the four of them were in the toilet when that function came within the province of PW3 who was the only senior officer in the group. However, on considering the totality of the evidence and the submissions of both learned Counsel for the accused and the learned Deputy, there was a question of law which bothered me, namely the question of the admissibility of PW4's evidence to the effect that when he discovered the incriminating package the accused embraced him and pleaded with him to throw it into the toilet. On reconsideration I was of the view that that part of PW4's statement relating to the accused's plea and request to him to dispose of the incriminating package became inadmissible under s. 113 of the Criminal Procedure Code as any such plea or request clearly amounted to a statement by the accused to a police officer below the rank of an Inspector. That statement was the only evidence indicating that the accused had custody or control of the incriminating package and without it the presumption under s. 37(d) could not have been invoked to attribute exclusive possession against the accused. In the circumstances I was of the considered view that the prosecution evidence was deficient in respect of the charge against the accused and that he should not have been called in the first place to enter upon his defence. I accordingly acquitted and discharged the accused.

Also found at [1992] 3 CLJ 1624